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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANTHONY M. SALONE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Questions Presented

1. Did the courts below apply the proper standard of proof in deciding the relief to which a federal government employee was entitled following a determination that he had been discriminated against in violation of Title VII of the Civil Rights Act of 1964?

2. Did the court below correctly apply the clearly erroneous standard of Rule 52(a), F.R. Civ. Proc., when the findings of fact in question were contrary to the evidence in the record?

Parties

Anthony M. Salone, Jr., Petitioner.

United States of America,
United States Civil Service Commission,
Secretary of the Air Force,
Calvin Rees, Arva Jean Massie,
William Tomlinson, Marion H. Bledsoe,

Respondents

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No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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ANTHONY M. SALONE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,
et al.

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Petition for a Writ of Certiorari to
The United States Court of Appeals
For The Tenth Circuit

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The petitioner, Anthony M. Salone, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on April 10, 1981. The opinion of the Court of Appeals is reported at 645 F.2d 875,

and is set out in the Appendix hereto at pages 1a-23a. The opinion of the District Court of April 25, 1979, and the judgment thereon entered May 31, 1979, are unreported and are set out in the Appendix hereto at pages 24a-40a. The order of the District Court denying petitioner's motion to alter or amend the judgment is set out in the Appendix hereto at pp. 41a-43a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 10, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 717(b),(c), and (d) of the Equal Employment Opportunity Act of 1972, amending Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-16(b), (c), and (d), provide, in pertinent part:

(b) Except as otherwise provided in this subsection, the Civil Service Commission* shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.

* * *

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex, or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge

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*/ Under the President's Reorganization Plan No. 1 of 1978, the functions of the Civil Service Commission under § 717 were transferred to the Equal Employment Opportunity Commission as of January 1, 1979.

with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) the provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

Section 707(g) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(g), provides:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees,

with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate....

The case also involves Rule 52(a), Fed. Rules of Civ. Proc.:

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. ... If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on

decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b).

Statement of The Case

This is the second appearance in this Court of this action brought under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16. Petitioner Anthony M. Salone, Jr., the plaintiff below, is a Black civilian employee of the United States Air Force at Tinker Air Force Base in Oklahoma City, Oklahoma. This action was commenced in 1973 after a final decision of the Civil Service Commission affirming the decision of the Department of Air Force denying his claim that he had been discriminated against on the basis of race with regard to certain employment opportunities, and

that he had suffered reprisal because he had filed an earlier complaint of discrimination. During the first administrative processing of the complaint a Civil Service Commission Complaints Examiner, following a hearing, had recommended that the Department of the Air Force find that plaintiff had been discriminated against and had suffered reprisal. (Defendants' Exhibit 1, p. 27). Despite this recommendation, the Air Force found to the contrary, requiring the filing of the present action.

The United States filed a motion for summary judgment based solely on the administrative record and decision of the agency. The District Court granted the motion, holding that the plaintiff was not entitled to a trial de novo of his claims of discrimination and reprisal. That decision was affirmed by the Tenth Circuit (511 F.2d 902 (1975)) and a petition for

writ of certiorari was filed in this Court. The decision of the court of appeals was vacated and the case remanded for reconsideration in light of the Court's decision in Chandler v. Roudebush, 425 U.S. 840 (1976), holding that federal employees are entitled to a trial de novo of their claims of discrimination in actions brought under Title VII. 426 U.S 917 (1976).

On remand to the District Court the case was first returned to the United States Civil Service Commission for further consideration (Order of Remand, March 28, 1977; Rec. on appeal, p. 55). The Civil Service Commission in turn sent the case back to the agency for a new decision. The agency again rejected the complaints examiner's holding with little elaboration. Therefore, a second action was filed in the District Court and the two actions were consolidated for trial.

In March, 1979, a five-day trial was held, based on live testimony and documentary evidence, including the full record of the administrative processing of the complaint. At the trial the United States did not contest the fact that plaintiff had been discriminated against because of his race. Indeed, the government's Proposed Findings of Fact specifically so acknowledged.[1/] Thus, the primary issue was the relief to which plaintiff was entitled.

1/ The government's proposed findings included the following:

> 4. That the plaintiff has been labeled as a troublemaker in his work environment because of his filing of discrimination complaints and has been reprimanded more than usual for his mistakes in his job performance.
>
> 5. That there existed at Tinker Air Force Base at the times complained of by plaintiff racial discrimination in the performance appraisals, promotions and job assignments of blacks in civilian employment.
>
> * * *

Plaintiff had consistently urged that he should be put in a higher GS level on the ground that in the absence of the earlier discrimination, he would have advanced similarly to comparable white employees who had not been discriminated against.

The District Court issued an opinion holding that plaintiff had been discriminated against, that he was entitled to be retroactively promoted to grade GS-7 as of 1970 and GS-8, step 1, as of 1972, and was also therefore entitled to back pay to make

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1/ continued

> 18. That the plaintiff has been a victim of racial discrimination in his employment at Tinker Air Force Base during the times complained of by the plaintiff.

Defendants' Proposed Findings of Fact, pp. 2-3 (Record on Appeal, pp. 79-80).

up the difference between those salaries and the salaries received as a GS-5 employee (Findings of Fact and Conclusions of Law, April 25, 1979, App. pp. 32a-34a; p. 39a). Subsequently, the Court entered a judgment granting a total of $15,544.32 in back pay and $5,181.44, or one-third, in counsel fees[2/] (App. 39a-40a).

A motion to alter or amend the judgment was filed urging that plaintiff should have been promoted to higher levels subsequent to the GS-8, step 1, promotion in 1972, since it had not been shown that he would not have normally advanced but for the discrimination (Rec. on Appeal, pp. 110). The District Court denied the motion to alter or amend, holding that plaintiff-

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2/ The court of appeals reversed the trial court's ruling on attorneys' fees. Therefore that issue is not a subject of this petition.

petitioner would not have advanced above a GS-8, step 1, in the time since 1972 because he was "a troublemaker" and his work had been unsatisfactory (App. 41a-43a). On appeal the Tenth Circuit upheld these findings as not clearly erroneous under Rule 52(a), F. R. Civ. Proc.

Statement of the Facts

Plaintiff-appellant was hired at the Tinker Air Force Base initially in 1947 as a wage board (or blue collar) employee. Following a long period during which he had experienced a number of difficulties and during which he received few promotions, he filed a complaint of discrimination in 1967. Shortly afterwards he was promoted to GS-5 supply clerk position (Series GS-2005) where he remained for 12 years, until 1979 (See, Def. Exhibit 1, p. 144; p. 19). After he had received what he

regarded to be an unsatisfactory and discriminatory performance appraisal he filed the present complaint of discrimination and reprisal.

The complaint was accepted and an investigation followed which unearthed evidence of general patterns of discrimination against blacks in the job categories in question, of a variety of improper employment practices, and of apparent acts of reprisal against the plaintiff. Both white and black co-workers of plaintiff attested that they believed he had suffered discrimination and reprisal (See, generally, Def. Exhibit 1, pp. 9-10, summarizing the affidavits at pp. 76, et seq.). Further, many stated that various supervisors had branded him a troublemaker because he had filed complaints of discrimination in the past. Nevertheless, the

local officials at Tinker Air Force Base proposed a finding of no discrimination (Def. Exhibit 1, pp. 41-43). Plaintiff exercised his right to have a hearing before a Civil Service Commission complaints examiner, and following that hearing, which consumed two days early in 1973, the complaints examiner issued a recommended decision of 23 pages based on a record of over 700 pages in which he found:

> Careful review, study and consideration of the total record compiled in this case leads me to conclude that Mr. Salone has been the victim of systematic, continuous discrimination within the Material Processing Division. The evidence is overwhelming that because of previous discrimination complaints which he pursued in 1967 and 1970, Mr. Salone has been branded as a "troublemaker" and has in numerous respects been treated differently from whites and, in many cases differently from other blacks who have not filed discrimination complaints. Id., p. 19.

The Department of the Air Force handed down its final decision of little more than a page on March 9, 1973. Its entire discussion of the record and the recommended decision of discrimination was, "The entire record of your complaint has been carefully reviewed and it has been determined that the evidence therein does not support your allegations of discrimination based on race" (Id., p. 6). Despite the requirements of the Civil Service Commission's regulations no further explanation was given as to why the detailed findings of the complaints examiner were summarily rejected.[3/] As stated above, this result precipitated the present action and eventually culminated in a five day hearing before the District Court early in 1979.

3/ See, 5 C.F.R. § 713.221(b)(2), now 29 C.F.R. § 1613.221(b)(2).

At the hearing the Court heard many of the same witnesses who provided affidavits and who testified at the administrative hearing in Mr. Salone's case. These witnesses gave testimony fully consistent with that given during the administrative process. His co-workers unanimously testified that Mr. Salone was a good and conscientious worker. However, they had heard from various persons, particularly at the supervisory levels, that he was "a troublemaker." Most of those employees assumed that referred to the fact, well known to everyone, that he had complained about racial discrimination. None of his co-workers testified either at the trial or during the administrative process that they themselves thought that Mr. Salone was a troublemaker or that he did not perform his duties well. (See, e.g.; the testimony in

the Transcript of Trial at pp. 275, 278, 289-291; 318; 334-335; 339-340). The only testimony to the contrary was from supervisors relating to the period prior to 1972 (See, e.g., Transcript, pp. 752-53.)

The supervisors charged with discrimination testified that they had not committed any discrimination. However, the government did not contest that discrimination had indeed taken place, but rather focused on what relief Mr. Salone was entitled to. The only testimony or evidence relating to the period after 1972 were documents showing that Mr. Salone had performed his duties in a highly satisfactory manner, receiving performance appraisals in the high nineties on a scale of 100. Indeed, in 1976 he was recommended for an outstanding performance rating. (Defendants' Exhibit 2).

Mr. Salone himself testified that he believed he could have advanced to the GS-14 or 15 level if he had been provided equal employment opportunities earlier in his career. He specifically noted that his qualifications were equal to or superior to those of whites who had so advanced. Thus, he had more than three years of college education as compared to high school diplomas held by some of the white supervisors.

The testimony further showed that at Tinker Air force Base it was not necessary to apply for positions as they became available. Profiles were developed by a computer of all employees who had the eligibility for positions, and those eligible were contacted to find out if they were interested in the positions (Transcript, p. 235; plaintiff's Exhibit 5, pp. 6-7). Mr. Salone had been contacted in the

period from 1972 for some GS-6 positions, but had declined some on the ground that they were dead-ended and could not lead to further advancement (Transcript, pp. 687-88). He had not declined others and although he had been considered for a number of GS-6 positions he had never been promoted to one (Defendants' Exhibit 2).

The District Court, in its denial of the motion to alter or amend the judgment, found that Mr. Salone was a troublemaker and did not perform his duties satisfactorily, notwithstanding the absence of any testimony to that effect. Indeed, these findings were directly contrary to the evidence noted above that Mr. Salone received high performance ratings in the period after 1972, and to the government's admissions at trial that he had been "labeled as a troublemaker ... because of

his filing of discrimination complaints" and that "the plaintiff's performance in his job was satisfactory" (Rec. pp. 79 and 80). In fact, in its original findings of fact the district court held that Mr. Salone's "performance in his job was satisfactory" (App. p. 29a).

Following the trial, Mr. Salone was given the position of freight rate specialist at the GS-8 level retroactive to 1972. As noted by the court of appeals (App. p. 12a), the freight rate specialist position ranges from grades GS-7 to GS-12 depending upon the level of responsibility. Thus, it is a job series in which promotions to higher levels may be achieved because of an increased level of responsibility and good performance without the necessity of competitive bidding. (Ibid.)

On appeal, the Tenth Circuit pointed out that the district court's findings that Mr. Salone was a troublemaker and did not perform his duties satisfactorily were at variance with the government's position at trial and to the judge's own finding that his job performance was satisfactory. The court also noted that the position into which petitioner had been placed was one in which promotions could be obtained without competition (App. pp. 11a-12a). Nevertheless, the court of appeals held that it could not be determined what vacancies were available and that the district court's findings of fact were not "clearly erroneous" as they related to further promotions, while holding that petitioner was entitled to periodic step increases from 1972 until the present (App. p. 16a).

REASONS FOR GRANTING THE WRIT

This case presents an issue of great importance in the enforcement of Title VII, viz., the relative burdens of proof in establishing the scope of relief after a finding of discrimination. The resolution of the issue by the court below conflicts with decisions of this Court and with other circuits. The decision also presents an important issue concerning the proper interpretation of the "clearly erroneous" rule embodied in Rule 52 of the Federal Rules of Civil Procedure.

I.

The Question of the Standard for Determining The Scope of Relief After A Finding of Discrimination Is One of Recurring Importance That Should Be Resolved by This Court.

In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), this Court held, with

regard to the entitlement to back pay after a finding of discrimination, that:

> It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful unemployment discrimination . . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past. . . ."

442 U.S. at 418.

Thus, when the injury is of an economic character:

> . . . "The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." Wicher v. Hoppock, 6 Wall 94, 99 (1867).

422 U.S. at 418-19.

As a result, back pay should be rarely denied and only for reasons that are "carefully articulate[d]." 422 U.S. 421-422, and n. 14.

Moreover, once discrimination has been found, the burden of proof is on the employer to demonstrate that the employee who has suffered from a violation of the law would not have received the employment benefit even if there had been no discrimination. Franks v. Bowman Transportation Co., 424 U.S. 747, 772-773 (1976). As this Court noted, in language directly applicable to the present case:

> It is true, of course, that obtaining the third category of evidence with which the District Court was concerned --what the individual discriminatee's job performance would have been but for the discrimination--presents great difficulty. No reason appears, however, why the victim rather than the perpetrator of the illegal act should bear the burden of proof on this issue.

424 U.S. at 773, n. 32.

This case, therefore, presents the opportunity for the Court to establish the precise parameters of the relative burdens

of proof for determining the scope of relief after a finding of discrimination in a Title VII case, in the same way it has in a series of decisions which have clarified the burdens of proof and production of evidence in deciding whether there has been discrimination in the first instance. McDonnell Douglas v. Green, 411 U.S. 792 (1973); Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Texas Dept. of Community Affairs v. Burdine, _____ U.S. _____, 67 L.Ed.2d 207 (1981). That the issue of the standard for determining the scope of relief is an important and recurring one in the enforcement of Title VII is demonstrated by the number of decisions in the

courts of appeals[4/] and the district courts.[5/]

The courts of appeals have established a variety of rules to govern such determinations. In the present case, as will be discussed below, the Tenth Circuit apparently placed the burden on petitioner to prove that he would have received further promotions, despite this Court's holding in Franks. The Third Circuit has held that the burden is on the employer to establish

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4/ Richerson v. Jones, 551 F.2d 918 (3rd Cir. 1977); Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976); Baxter v. Savannah Sugar Refining Co., 495 F.2d 437 (5th Cir. 1974); Marotta v. Usery, 629 F.2d 615 (9th Cir. 1980).

5/ There have been numerous cases involving federal agencies alone. See, e.g., Nitterright v. Claytor, 454 F. Supp. 130 (D.D.C. 1978); Foster v. Simon, 467 F. Supp. 533 (W.D.N.C. 1979); Guilday v. Dept. of Justice, 485 F. Supp. 324 (D. Del. 1980); Hernandez v. Powell, 424 F. Supp. 479 (N.D. Tex. 1977).

by a preponderance of evidence that the discriminatee would not have received promotions,[6] while the Fifth,[7] Ninth,[8] and District of Columbia Circuits[9] have imposed a burden on the employer to come forward with clear and convincing evidence. Moreover, by regulation the Civil Service Commission and subsequently the Equal Employment Opportunity Commission have adopted the District of Columbia Circuit's "clear and convincing" standard to govern the granting of relief to federal

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6/ Richerson v. Jones, 551 F.2d 918 (3rd Cir. 1977).

7/ Baxter v. Savannah Sugar Refining Co., 495 F.2d 437 (5th Cir. 1974), cited with approval in Franks v. Bowman Transportation Co., 424 U.S. at 772.

8/ Marotta v. Usery, 629 F.2d 615 (9th Cir. 1980).

9/ Day v. Mathews, 530 F.2d 180 (D.C. Cir. 1978.

employees in the administrative process.[10/]

II.

The Decision of The Court Below Conflicts with Decisions of This Court and Other Circuit Courts

As recited in the statement of the case, after seven years of denials, it was only on the eve of trial that the Department of the Air Force finally acknowledged that Mr. Salone had been discriminated and

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10/ 29 C.F.R. § 1613.271 provides that where discrimination has been found, a retroactive promotion with pay shall be granted, "unless the record contains clear and convincing evidence that the employee would not have been promoted or employed at a higher grade, even absent discrimination." The provision was first adopted by the then Civil Service Commission as an amendment to 5 C.F.R. § 713.271, and was made applicable to cases pending before an agency or a court on November 14, 1978, the amendments effective date. 43 F.R. 52694 (Nov. 14, 1978); Federal Personnel Letter No. 713-44 (Civil Service Commission, Dec. 11, 1978). The new regulation and the interprative FPM letter were adopted by the EEOC when it assumed jurisdiction over federal EEO on January 1, 1979. See, 43 F.R. 60900 (Dec. 29, 1978).

reprised against because of his race and because he had earlier filed complaints of discrimination. Mr. Salone was denied promotions in 1970 and 1972; therefore, the district court awarded him promotions to a GS-7 and GS-8 back to those years respectively. The courts below declined, however, to grant full relief, viz., additional promotions which Mr. Salone would have received from 1972 to 1979 in the absence of the illegal denials in the earlier years.

In so ruling, the court of appeals evidently placed the burden on Mr. Salone to demonstrate that he would have gotten the promotions, rather than properly upon the defendant-employer to demonstrate that the promotions would not have been received even if Mr. Salone had been properly advanced in the earlier years. Thus,

although the court never directly articulated the standard or relative burdens of proof it was applying,[11/] it did note that the evidence in the record as to petitioners' performance was "contradictory" (App. p. 13a). Similarly, it stated that there was no evidence in the record as to what vacancies might have been available to which he could have been promoted, despite its earlier notation that the job series into which petitioner was eventually placed was one in which he could have advanced to the GS-12 level without competition (Compare App. p. 12a, with p. 15a).

11/ Petitioner argued in his brief that the court should adopt the "clear and covincing evidence" burden imposed on employers by the District of Columbia Circuit in Day v. Mathews, supra and by the Fifth Circuit in a number of cases. None of these cases were mentioned or discussed by the court below.

Thus, the court evidently resolved any doubts in the record against petitioner, and thus placed the burden of persuasion on him, in direct conflict with this Court's holding in Franks (see supra), and with the rules adopted by the Third, Fifth, Ninth, and District of Columbia Circuits. The Tenth Circuit's approach here may, for example, be contrasted with that taken in Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976), where the court held that in the case of an individual federal employee who has established discrimination, it is "'impossible . . . to recreate the past with exactitude' . . . precisely because of the employer's unlawful action," and, therefore, "it is only equitable that any resulting uncertainty be resolved against the party whose action gave rise to the problem." Day v. Mathews, 530 F.2d at

1086, citing Baxter v. Savannah Sugar Refining Corp., 495 F.2d 437 (5th Cir. 1974), and Johnson v. Goodyear Tire & Rubber Co., 491 F. 2d 1364 (5th Cir. 1974). See also, Richerson v. Jones, 551 F.2d 918 (3rd Cir. 1977).

The placing of the burden of proof regarding entitlement to full relief on petitioner was particularly inequitable under the facts of this case. The promotion to a GS-8 was denied in 1972; in 1973 a Civil Service Commission complaints examiner found unlawful discrimination and reprisal against Mr. Salone. If the Air Force had accepted that decision then, petitioner would have been placed in the GS-8 position in 1973 and there would have been no doubts as to his work performance or whether he would have received promotions in the period from 1973 to 1979.

Instead, the defendant summarily rejected the recommended decision, denied discrimination when this case first went to court in 1973, argued against Mr. Salone's right to a plenary trial all the way up to this Court, and again rejected his claim of discrimination when given another opportunity to resolve it administratively in 1977.

It was only on the eve of trial in February, 1979, seven years after Mr. Salone had been denied the promotion, that the Air Force admitted that he indeed had suffered illegal discrimination and reprisal. However, it then argued that it was up to Mr. Salone to prove what the course of his career would have been if the agency had carried out its statutory and regulatory duties and properly adjudicated Mr. Salone's complaint in the first

instance. Since it was solely the failure of the Air Force that petitioner did not receive the promotions when he should have, any doubts as to what would have happened should be resolved against it, and Mr. Salone should be entitled not only to the retroactive promotion to a GS-8 but to subsequent career advancement to at least a GS-12, the top rung of the job series in which he was eventually placed. Only in this way will he receive the complete relief for the discrimination he suffered to which he is entitled and "'be placed ... in the situation he would have occupied if the wrong had not been committed'". Albemarle Paper Co. v. Moody, 422 U.S. at 418-19.

III.

This Case Presents An Important Issue Concerning The Proper Interpretation of The Clearly Erroneous Rule.

In Texas Department of Community Affairs v. Burdine, ____ U.S. _____, 67 L.Ed.2d 207 (1981), this Court found it unnecessary to reach the question of the proper application of the "clearly erroneous" standard of appellate review of findings of fact embodied in Rule 52(a), F.R. Civ. Proc., in a Title VII case. 67 L.Ed.2d 219, n.12. Presently before the Court is Pullman Standard Co. v. Swint, Nos. 80-1190 and 80-1193, in which the issue is presented in the context of an appellate court's overturning a district court's findings of facts. The present case provides the opportunity to clarify the circumstances under which reliance on Rule 52(a) is improper. As noted above, the Court of Appeals upheld the trial

court's denial of full relief by invoking the clearly erroneous standard (App. p. 16a). Petitioner urges that the court below was incorrect for two reasons.

First, the court never addressed the threshold issue of the legal standard that should have governed factual findings. As argued above, the burden of persuasion that petitioner should not receive full relief should have been placed on the employer, with any doubts resolved against it. The court below noted contradictions and uncertainties in the record, but held that it was appropriate to resolve them all against the plaintiff. As Burdine makes clear, if the wrong legal standard was applied, then the issue of whether the findings were erroneous should not have been reached. 67 L.Ed.2d 219, n.12.

Second, the clearly erroneous standard is not intended to insulate findings of

fact from any review. Thus, findings must be overturned if a reviewing court is convinced that they are incorrect. United States v. U.S. Gypsum Co., 333 U.S. 365 (1948). In the present case, the district court denied further promotions on grounds that were clearly erroneous, since they were not only unsupported, but directly contradicted by the record. The issue was whether from the period 1972 until trial in 1979 Mr. Salone would have advanced beyond the GS-8 level if he had received the promotion to GS-8 in 1972. The District Court held that he would not have been based on two factual determinations, that he did not perform in his position satisfactorily, and that he was "a troublemaker".

The record, however, establishes unequivocably with regard to the first basis that not only did Mr. Salone perform

satisfactorily but that he was a superior employee. Mr. Salone consistently received performance ratings in the high 90's on a scale of 100 throughout the period and was even nominated for an outstanding performance award in 1976. With regard to the charge of being "a troublemaker," the government itself acknowledged at trial that the label had been pinned on Mr. Salone by high level management officials because he had exercised his right to file a complaint charging employment discrimination.[12/] Thus, the charge was part of the pattern of reprisal which in itself violated Title VII. Further, the testimony relating to his being "a trouble-

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12/ The "troublemaker" label has more than once been used against Blacks who have insisted on their rights. See, Meredith v. Fair, 305 F.2d 343, 356-358 (5th Cir. 1962). Like James Meredith, Mr. Salone is "a man with a mission" who will not tolerate racial discrimination. Id. at 358.

maker" was restricted to the period before 1972 and consisted almost entirely of his fellow employees' attesting to the fact that he had been so called because of his EEO activities. There was no evidence in the record that he was considered a troublemaker from 1972-1979, the period in question.

CONCLUSION

For the foregoing reasons, the petition should be granted and the decision below reversed.

Respectfully submitted,

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APPENDIX

Decision of the Court of Appeals

April 10, 1981

No. 79-1929

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

==========

ANTHONY M. SALONE, JR.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.

Defendants-Appellees.

==========

Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. Nos. Civ.-73-591-E and 78-0091-E, consol.)

==========

April 10, 1981

Before HOLLOWAY, BARRETT and DOYLE, Circuit Judges

DOYLE, Circuit Judge.

The basic question in this case is whether the award in a Title VII civil rights case, 42 U.S.C. § 2000e et seq., was sufficient. The case before us is the second appeal following a second trial. The first opinion of this court affirmed a denial of a trial de novo following adverse administrative findings. The Supreme Court reversed the affirmance and it directed that the case be remanded for trial. See 426 U.S. 917, 96 S. Ct. 2620, 49 L.Ed. 370 (1976).

The case was tried in the district court and following the trial a judgment was entered in favor of the appellant, Salone. This appeal asserts that the judgment entered was inadequate and that the attorneys fees were also inadequate. Reversal is sought in these two areas. The government, the appellee herein, does not have any fault to find with the judg-

ment as entered. It opposes, however, any upward modification of that judgment.

The plaintiff-appellant, Anthony Salone, has been a civilian employee at Tinker Air Force Base in Oklahoma City since May 1947. The initial action was commenced in 1973 following a final decision of the Civil Service Commission which referred the decision to the Department of the Air Force. It had denied Salone's claim that he had been discriminated against on the basis of race in regard to certain employment opportunities or promotion possibilities. Also denied was Salone's claim that he had suffered reprisal because he had filed an earlier complaint of discrimination.

As we indicated briefly above the United States moved for summary judgment upon the administrative record and the decision of the Agency. The district court

granted that motion and held that the plaintiff was not entitled to a trial de novo of his claims of discrimination reprisal. That decision was affirmed by this court, 511 F.2d 902 (1972) and the petition for certiorari was filed and was granted. The judgment entered by the district court in the first case and approved by this court directed that the case be remanded for reconsideration in the light of the Supreme Court's decision in Chandler v. Roudebush, 425 U.S. 840 (1976), which case had held that federal employees were entitled to a trial de novo, rather than administrative review of their claims of discrimination under Title VII.

Following remand to the discrict court the case was sent back to the United States Civil Service Commission for further consideration. That body sent it to the Agency for a new decision. The Agency

rejected the complaints and the examiners' holding and the second action was then filed in the district court and the two actions were consolidated.

In March 1979 a five day trial took place on the merits of the case. Live testimony and documentary evidence was presented. At that trial the United States did not contest the issue of discrimination against Salone based on his race (Mr. Salone is black). Indeed, the government's proposed findings of fact acknowledged that there had been discrimination. Thus, the case boils down to how much should be awarded.

The plaintiff took the position that he ought to have been placed in a higher G.S. level. He reasoned that in the absence of the earlier discrimination he would have advanced in a manner similar to

comparable white employees who had not been discriminated against.

The district court issued an opinion holding that the plaintiff had been a victim of discrimination and that he was entitled to be retroactively promoted to a G.S.-7 as of 1970 and a G.S.-8, step 1 as of 1972 and was also therefore entitled to back pay to make up the differences between those salaries and the salaries which he received as a G.S.-5 employee. Subsequently a hearing was held on the issue of attorneys fees. The trial court announced that any counsel fee recovery would be limited to one-third of the back pay recovery. Thereupon the court entered a judgment granting a total of $15,544.32 in back pay and $5,181.44 or one-third in counsel fees. It was first contended by the plaintiff that he should have been

promoted to higher levels following the G.S.-8, step 1 advancement which was made by the court in 1972. He claimed that it had not been shown that he would not have normally advanced absent the discrimination. The second contention was that the attorneys fees were inadequate; that they did not consider the amount of time that was spent and did not take into acocunt that there were two court proceedings on appeal to this court and to the United States Supreme Court in order to obtain relief for the plaintff. It was argued that the award of a flat fee following all this litigation over a long period of time was out of harmony with law applicable to the calculation of attorneys' fees in civil rights cases. The trial court denied the motion to alter or amend and held that the plaintff-appellant would not have

advanced above a G.S.-8, step 1 in the time since 1972 because he was a troublemaker, and that his work had been unsatisfactory. As to the attorneys' fees the court held that the amount requested was unreasonable but did not make any findings of fact to support this conclusion. Timely notice of appeal was filed and the case eventually was placed on the calendar.

The evidence shows, as has previously been noted, that the appellant's first employment was a Wage Board or blue-collar employee in 1947 and that he did not file a compolaint of discrimination until 1967. After that he was promoted to a G.S.-5, supply clerk position. He remained there until 1979. After he had received what he regarded as an unsatisfactory discriminatory performance appraisal, he filed the present complaint.

In the most recent hearing before the Civil Rights Commission it was concluded by the examiner that the evidence was overwhelming that because of previous discrimination complaint which he had pursued in 1967 and 1970 Salone had been branded as a troublemaker and had in numerous respects been treated differently than whites, and in many cases differently from other blacks who had not filed discrimination complaints. The Air Force refused to recognize the decision of the Civil Service Commission in 1973. At the hearing before the district court in 1979 the witnesses who had provided affidavits and who had testified at the administrative hearing gave testimony. This evidence showed not only that there had been discrimination but also that he was a good and conscientious worker. From other sources there was

testimony that he was a troublemaker. The supervisor testified at the trial that there had not been discrimination. However, as has been shown, the government did not contest that discrimination had indeed taken place; but instead it emphasized the nature and character of the relief which was to be granted. The testimony relating to the period after 1972 showed that he had received performance appraisals in the high 90s on a scale of 100. In 1976 he was recommended for an outstanding performance rating. Salone also testified that he had in excess of three years of college education. He stated that he believed that he would have advanced to a G.S.-14 or 15 level if he had been provided equal employment opportunities early in his career.

Further testimony showed that at Tinker Air Force Base it was unnecessary to apply for positions as they became avail-

able. Profiles were developed by computer of all employees who had the eligibility for positions, and those eligible were contacted to ascertain if they were interested. Salone had been contacted in a period from 1972 for some G.S.-6 positions but had declined some on the ground they were dead-end and could not lead to further advancement. He had not declined others and although he had been considered for a number of G.S. positions, had never been promoted. The trial court in its findings has stated that Mr. Salone was in fact a troublemaker and did not perform his duties satisfactorily. However, these findings were at variance with the position which the government took admitting that he had been labelled as a troublemaker because of having filed discrimination complaints and that his performance on the job was satisfactory. Following the trial court's

decision Salone was advanced to the position of a freight rate specialist, a G.S.-8, step 1 level retroactive to 1972. This position ranges from a G.S.-7 to G.S.-12, depending on the amount of responsibility. It apparently is a job series for which promotions to higher levels may be achieved because of an increased level of responsibility and performance and that this can be accomplished without competitive bidding.

I.

Was the plaintiff entitled to be upgraded beyond the G.S.-8 rating that he finally received?

There is a good deal of evidence concerning this charge, that the plaintiff was a troublemaker. At the same time there is ample evidence that he was a good workman and that he had been trying hard to

better himself both by gaining additional education and by working hard. His ratings were good and he was considered for other positions. However, the trial court found:

> 4. That the plaintiff is known by all his co-workers, both supervisory and otherwise, as a troublemaker. He has earned this label because he has gone out of his way to create turmoil and controversy; however, he has been discriminated against because of his color.
>
> * * * * *
>
> 5. Plaintiff has been a victim of this discrimination, although a good part of the reason for his not being promoted was because he is a trouble-maker.
>
> 6. That plaintiff's performance in his job is satisfactory.
>
> 22. That the plaintiff is properly before this Court and has sustained his burden of discrimination in his employment herein.

So the evidence is contradictory; on the one hand it shows that he had a highly satisfactory job performance and at the

same time he was held to have been a troublemaker. This latter is rather difficult to understand in view of the fact that his performance ratings were extremely high. Nevertheless the evidence in the record is sufficiently strong to sustain that his job performance was good or satisfactory and that he had been labelled as a troublemaker because of his assertion of his rights.

The evidence shows that periodic step increases for General Schedule employees are automatic if the employee's work is of an acceptable level of competition as determined by the head of the Agency. 5 U.S.C. § 5335. The purpose of Title VII is to put the plaintiff in the place he would have been but for the discrimination. Under the statute he is entitled to get all the benefits that he would have had had there not been discrimination. Unquestion-

ably Mr. Salone would have received his annual step increases for the G.S.-7 rating from 1970 to 1972. Moreover he would have received the step increases for the G.S.-8 after 1972 to the point where he was advanced. Unfortunately for Mr. Salone there is no evidence in the record that he would have advanced to a higher grade after 1972 if at that time he had had a G.S.-8. We have no evidence in the record as to the vacancies which were available, the requirements of those jobs nor do we have any way to determine Mr. Salone's hypothetical experience in his retroactive promotion to G.S.-8. The effective 118 months or so as G.S.-8 is perhaps not unusual. There is evidence which, if it had been accepted, would have justified award of a higher rating but there is also evidence which supports the ratings which were given.

All in all we are unable to conclude that the trial court's determination as to the grade that Mr. Salone should have had was clearly erroneous. The trial court, as the trier of the fact, must be upheld in the absence of evidence showing that the determination was clearly erroneous. For that reason the decision of the trial court as to the grade that Mr. Salone would have had, that is the G.S.-7 to 1972 and the G.S.-8 thereafter, cannot be set aside. However, there is need to modify the decision as to the steps in the grade which he would have had with the ratings which were given him during the periods in question, that is 1970 to 1972 and 1972 forward. Inasmuch as the specific information relative to step increases and the salary changes for the years in question which would have been given is not in the record, the case must be remanded for the

purpose of ascertaining what they are and for the purpose of awarding these increases to the plaintiff-appellant.

II.

Was the award of attorneys' fees inadequate for the record and is the appellant entitled to a rehearing on this issue? We hold that he is.

A 1972 amendment to the Civil Rights Act is concerned with attorneys' fees and reads as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same a a private person.

42 U.S.C § 2000e-5(k) (1976).

The question is whether the trial court's measurement of the attorneys' fee in terms of the one-third of the back pay award to

Mr. Salone in the amount of $5,181.44 was erroneous. An effort was made to persuade the court to amend the judgment. The court said to this:

> The court has already awarded a reasonable attorneys' fee in this case. What plaintiff seeks is entirely unreasonable and not in keeping with the value of the services rendered nor justified when compared with the result obtained.

There was evidence in the record consisting of affidavits from several attorneys involved in the case from the time of the administrative procedures, the appeals, the Supreme Court petition, the trial and the second appeal. These affidavits appear to have been submitted with a motion to amend the judgment. The transcript reflects a short hearing to determine "[W]hether the court would go on an hourly basis or a percentage basis on the amount of the award." From the transcript it is to be inferred that the only

factor considered by the judge was the size of the back pay award to be entered into the one-third formula.

The plaintiff asserts that the fee awarded is small in relationship to the complexity of the case and the number of hours (245) of lawyer time involved in it. Plaintiff argues further that the purpose of the Civil Rights Statute is to make the plaintiff whole and that the inadequate attorneys' fee defeats that purpose. The amount prayed for was $20,045.00. We are not saying that this is a reasonable fee but it does relate to the great amount of time spent, the complexity of the proceedings, including the several appeals. In support of his position the appellant cites Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) which sets forth a number of factors in the ABA Code of Professional Responsibility.

The Tenth Circuit has not followed any fixed standard in setting attorneys fees in Title VII cases. However, in EEOC v. Safeway Stores, Inc., 597 F.2d 251, 253 (10th Cir. 1979), this court did tend to follow the Johnson v. Georgia Highway Express, supra, standards and the court said that where the plaintiff has prevailed in a civil suit he is not, "necessarily limited to a back pay award" and that "[t]here are many factors to be considered, and the size of any monetary award is but one." Considered in that case were a great variety of factors and this court did not disprove the method used by the trial judge. Similarly in Carreathers v. Alexander, 587 F.2d 1046, 1052 (10th Cir. 1978) it was said that "[t]he trial court is entitled to demand ... a number of items, such as the nature and extent of services, the time required, the results accom-

plished, the value of the matter and the professional skill and experience of the attorney." The court also said "that the hours expended by the attorney is not the sole factor." Brito v. Zia Company, 478 F.2d 1200 (10th Cir. 1973) holds to the same effect but it approved in 1973 a $12,00 per hour award. We conclude that the standards as set forth in Johnson v. Georgia Express, supra, should generally be applied where attorneys' fees are authorized. Battle v. Anderson, 614 F.2d 251 (10th Cir. 1979); E.E.O.C. v. Safeway Stores, supra. Although Battle adopted standards for attorneys' fees by following the legislative history of 42 U.S.C. § 1988, we believe that it presents a parallel situation and its reasoning should apply to Title VII attorneys' fees awards as well. The case should be remanded to the district court for a hearing on attor-

neys' fees and should include a reasonable fee for the present appeal.

* * * * *

In summary then, our conclusion is that judgment should be affirmed in large part and that it should be reversed for the purpose of computing the step increases which would accrue to the plaintiff herein considering that he had the G.S.-7 grade for 1970-1972 and the G.S.-8 grade from 1972 onward until such time as he was granted a new position. The cause must be remanded, as we say, in order to receive evidence and to draw conclusions as to the added amount. There must also be a hearing on the matter of attorneys' fees which applies the standards as previously discussed.

Accordingly then the judgment of the district court is affirmed in large part. It is reversed in the particular noted and it is remanded to the district court for further proceedings consistent with the views expressed herein.

Decision of District Court

No. CIV-73-591-E
No. CIV-78-0091-E

IN THE

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

October Term, 1980

==========

ANTHONY M. SALONE, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.

Defendants.

==========

FINDINGS OF FACT AND CONCLUSION OF LAW

Before LUTHER B. EUBANKS, United States District Judge.

Introduction

This matter comes on before the Court on the 7th, 8th, 9th, 14th and 15th days of March, 1979, pursuant to plaintiff's Complaints, Title 28 U.S.C. §§ 1331 and 1332, and Title 42 U.S.C. § 2000e, et seq., for alleged violation of the statutory and constitutional civil rights of the plaintiff herein. The plaintiff, Anthony M. Salone, Jr., being present in person and represented by his attorney, Claude V. Sumner, and the defendants appearing through Larry D. Patton, United States Attorney for the Western District of Oklahoma, by John E. Green, First Assistant United States Attorney for the Western District of Oklahoma. All parties announced that they were ready for trial and the Court, after hearing the testimony, statements of counsel for the respective

parties, reading the pleadings herein, observing the exhibits filed herein, and being fully advised and informed in the premises, does now find and conclude as follows:

Findings of Fact

1. That the United States, pursuant to the subpoena duces tecum served herein calling for four copies of the requested materials is required to supply one copy of said materials to the plaintiff and not four copies.

2. That the basis of the plaintiff's Complaint involves allegations of under-rated job performance grading system; low performance ratings based on racial prejudice and prior complaints of racial discrimination of the plaintiff by the defendants; and denial of appropriate job assignments, training and promotional

opportunities resulting from alleged racial discrimination by the defendants.

3. That the plaintiff contends that he should have a rating above the GS-5 rating that he has held for approximately 12 years.

4. That plainitff is known by all his co-workers, both supervisory and otherwise, as a troublemaker. He has earned this label because he has gone out of his way to create turmoil and controversy; however, he has also been discriminated against because of his color.

5. That there existed at Tinker Air Force Base at the times complained of by plaintiff racial discrimination in the performance appraisals, promotions and job assignments of blacks in civilian employment. Plaintiff has been victim of this discrimination, although a good part of the

reason for his not being promoted was because he is a troublemaker.

6. That the affirmative action program at Tinker Air Force Base has improved from the status that it was at the time that plaintiff lodged his original complaint. Today the Court believes that racial discrimination has been eliminated at this Base.

7. That the plaintiff was never fully utilized in his employment status based upon his education and abilities.

8. That the plaintiff's learning ability score of 54 is considered to be average at Tinker Air Force Base.

9. That factors considered in promoting an individual at Tinker Air Force Base involved education, supervisor's appraisals, learning ability score, training time, awards, suggestions and previous supervisory experience, if any, and

experience, with certain positions requiring a test for those particular positions.

10. That a supervisory appraisal score in the high 90's is generally present in the top five persons placed on profiles for particular jobs that would be considered as a promotion for the individual involved.

11. That there must be a vacancy to be filled in order to promote a person to a high position.

12. That the plaintiff's performance in his job was satisfactory.

13. That the plaintiff exhibited an attitude of nervousness and anger when he was counseled by his supervisors.

14. That the plaintiff has declined some positions that could have been considered as promotions in other areas of work at Tinker Air Force Base.

15. That in the plaintiff's division, Materials and Supply Processing at Tinker Air Force Base, presently there are one person each in GS ratings of 13, 14 and 15, respectively; four in GS-12; three in GS-11; none in GS-10; 12 in GS-9; two in GS-8; and six in GS-7 ratings.

16. That the plainitff has over 31 years of employment at Tinker Air Force Base, starting as a WP-5.

17. That the plaintiff has made numerous complaints of racial discrimination to management at Tinker Air Force Base. Some of these complaints were without foundation in fact but others did have some substance.

18. That the plaintiff has been a victim of racial discrimination in his employment at Tinker Air Force Base during the times complained of by the plaintiff.

19. That the plaintiff should be promoted to the grade of GS-8 retroactive to June 28, 1972.

20. That no punitive damages should be awarded to the plaintiff herein.

21. That no money judgment awards should be made against the individual defendants herein.

22. That the plaintiff is properly before this Court and has sustained his burden of discrimination in his employment herein.

23. That the plaintiff has not shown that he is entitled to a GS-15 rating or other high supervisory rating.

Conclusions of Law

1. That this matter is before the Court pursuant to Title 42 U.S.C. §§ 2000e-16(c) and 2000e-5.

2. That the two cases filed herein by plaintiff raised the same or identical common issues of law and fact and are consolidated pursuant to Rule 42(a) Fed.R.Civ.P.

3. That the case was tried de novo before the Court with the Court considering the Administrative Record herein along with the testimony of witnesses, the pleadings and exhibits herein in accordance with Chandler v. Roudebush, 425 U.S. 840, 864 (1976), and Salone v. United States, 426 U.S. 917 (1976).

4. That the Court on the Rule 45(b) Fed.R.Civ.P. will modify the subpoena duces tecum herein served upon certain employees of Tinker Air Force Base on March 6, 1979, to the extent that only one copy of the requested material be produced. Fox v. House 29 F. Supp. 673, 677 (E.D. Okla. 1939).

5. That the plaintiff has been a victim of racial discrimination in his performance appraisals, promotion and training for possible higher ratings.

6. That there must be a vacancy to be filled in order to promote a person from one position to a higher position.

7. That plaintiff has sustained the burden of showing racial discrimination in his employment and was discriminated at Tinker Air Force Base during the times mentioned in his complaint.

8. That the plaintiff is not entitled to promotion to a GS-15 rating or other higher supervisory rating.

9. That the plaintiff should be immediately promoted to the grade of GS-8, and said rating should be retroactive to June 28, 1972, and should be paid as if promoted to the grade of GS-7 effec-

tive June 28, 1970, and continuing until June 28, 1972.

10. That the plaintiff is not entitled to monetary damages against the individual defendants herein, since at all times herein they were acting in their official capacities in their employment with the United States. Monell v. Department of Social Services, 532 F.2d 259, 264, 265 (2d Cir. 1976); Wood v. Strickland, 420 U.S. 308, 322 (1975); Scheuer v. Rhodes, 416 U.S 232, 249-250 (1974).

11. That punitive damages are not available as a remedy for discrimination in employment under the Civil Rights Act, as the same applies to the United States of America. Littleton v. Titro Corporation of America, 130 F. Supp. 774, 776 (N.D. La. 1955); Missouri Pacific R.R. Co. v. Ault, 256 U.S. 554, 563 (1921); Norfolk-Southern R.R. Co. v. Owens, 256

U.S. 565, 566 (1921); Crockett v. Citizens & Southern Financial Corp., 349 F. Supp. 1104 (N.D. Ga. 1972); EEOC v. Detroit Edison Co., 515 F.2d 301, 308-310 (6th Cir. 1975); and Russell v. American Tobacco Co., 528 F.2d 357, 366 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). See also Spurlock v. United Airlines, Inc., 330 F. Supp. 228, 230 (D.C. Colo. 1971), aff'd, 475 F.2d 216 (10th Cir. 1972).

12. That the plaintiff should have judgment in accordance with the findings and conclusions herein.

13. That counsel for the parties forthwith meet and endeavor to reach accord as to the amount of plaintiff's monetary judgment, including interest.

14. That counsel endeavor to agree on a reasonable attorney's fee for plaintiff's counsel, but if unable to do so this Court will conduct an evidentiary

hearing with respect to attorney's fee on Thursday, April 26, 1979, at 9:30 a.m.

DATED this 25 day of April, 1979.

United States District Judge

No. CIV-73-591-E
No. CIV-78-0091-E

IN THE

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

October Term, 1980

==========

ANTHONY M. SALONE, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.

Defendants.

==========

J U D G M E N T

This matter came on before the Court on the 7th, 8th, 9th, 14th and 15th days of March, 1979, pursuant to plaintiff's Complaints, Title 28 U.S.C §§ 1331 and 1332, and Title 42 U.S.C. § 2000e, et seq., for alleged violation of the statutory and constitutional civil rights of the

plaintiff herein. The plaintiff, Anthony M. Salone Jr., being present in person and represented by his attorney, Claude V. Sumner, and the defendants appearing through Larry D. Patton, United States Attorney for the Western District of Oklahoma, by John E. Green, first Assistant United States Attorney for the Western District of Oklahoma. All parties announced that they were ready for trial and the Court, after hearing the testimony, statements of counsel for the respective parties, reading the pleadings herein, observing the exhibits filed herein, and being fully advised and informed in the premises, does now find and conclude that he should make judgment based on his findings of fact and conclusions of law filed herein on the 25th day of April, 1979 and makes the following orders and judgment:

IT IS THEREFORE ORDERED ADJUDGED AND DECREED THAT:

1. The Court adopts all the Findings of Fact and Conclusions of Law filed by the Court on the 25th day of April, 1979.

2. That plaintiff has been denied equal employment opportunities by the defendants, countrary to law.

3. That the plaintiff should be immediately promoted retroactively to the grade of GS-8, step 1 with said rating retroactive to June 28, 1972, and should be paid backpay as if promoted to the grade of GS-7, step 1 effective June 28, 1970, and continuing until June 28, 1972. The amount of the backpay award should be the difference between what he actually received in pay and what he would have received in pay had he been promoted in accordance with this judgment with total backpay award in the amount of $15,544.32.

4. That the Court denies punitive damages against the Federal Government and denies damages against the individual defendants.

5. That the defendant pay plaintiff's costs in this action and plaintiff's attorneys' fees in the amount of one third of the back pay in the total amount of $5,181.44.

DATED THIS 31st day of May, 1979.

United States District Judge

ENTERED IN JUDGMENT DOCKET ON
May. 31, 1979

No. CIV-73-591-E
No. CIV-78-0091-E

IN THE

UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

October Term, 1980

==========

ANTHONY M. SALONE, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

==========

ORDER

The motion of the plaintiff to alter or amend the judgment herein is denied. Therein plaintiff argues that he would have been promoted and advanced after attaining rating GS-8 on June 28, 1972, or alternatively would at least have received step

increases thereafter except for the discrimination which he has established. The court finds that plaintiff would not have received any promotions or step increases after June 28, 1972, because he was a trouble maker and spent a great deal of his time agitating other employees against management and became so preoccupied with his efforts to disrupt the procedure at Tinker that his job performance was unsatisfactory, and his denial of advancement after said date was because of these factors and not because of his race.

The court has already awarded a reasonable attorney fee in this case. What plaintiff seeks is entirely unreasonable and not in keeping with the value of the services rendered nor justified when compared with the results obtained.

The Clerk of the Court is directed to mail a copy hereof to counsel of record.

DATED this 22 day of June, 1979.

United States District Judge

Office - Supreme Court, U.S.
FILED
SEP 15 1981
ALEXANDER L. STEVAS
CLERK

No. 81-83

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY M. SALONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

LEONARD SCHAITMAN
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QUESTIONS PRESENTED

1. Whether the courts below, in awarding petitioner retroactive promotions with backpay in this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, erred in requiring petitioner's federal government employer to promote him to the GS-8 grade level rather than to a higher grade level.

2. Whether the court of appeals properly applied the "clearly erroneous" standard of review dictated by Rule 52(a), Fed. R. Civ. P.

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United States v. *United States Gypsum Co.*, 333 U.S. 364 8

Statute and rule:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 1, 2

Fed. R. Civ. P. 52(a) 7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-83

ANTHONY M. SALONE, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 645 F. 2d 875. The opinion and order of the district court (Pet. App. 24a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1981. The petition for a writ of certiorari was filed on July 9, 1981. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are set forth on pages 3-5 of the petition.

STATEMENT

1. Petitioner, a black civilian employee of the United States Air Force at Tinker Air Force Base in Oklahoma, instituted this action in 1973 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, following final administrative denial of his claims of racial discrimination and reprisal for previously filed complaints (Pet. App. 3a). The district court, in the first trial of this case, granted summary judgment for the government on the basis of the administrative record, and the court of appeals affirmed (*id.* at 3a-4a). 511 F. 2d 902 (10th Cir. 1975). This Court, however, vacated that judgment and remanded the case for further consideration in light of *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), which held that federal employees are entitled to a trial *de novo* in the district court of suits under Title VII. 426 U.S. 917 (1976).

Following additional administrative proceedings again culminating in a denial of petitioner's claims, this case returned to the district court in 1979 for a trial *de novo* (Pet. App. 4a-5a, 32a).[1] Petitioner, who at the time had served as a GS-5 grade level supply clerk since 1967 (*id.* at 8a), contended that he would have advanced to a higher grade level in the absence of discrimination.

The district court convened a five-day hearing during which 22 witnesses testified, including several of petitioner's former and present supervisors and fellow employees. Evidence was presented which suggested that both black and

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[1]Contrary to the court of appeals' and petitioner's assertions that the government did not contest the issue of discrimination at trial (Pet. 9; Pet. App. 5a), the government did present testimony that there had been no discrimination against petitioner (see, *e.g.*, Tr. 758-760). At the conclusion of trial, however, the district court ordered the parties to prepare proposed findings of fact after stating "there has been discrimination proven here" (Tr. 786). The government's proposed findings of fact were, of course, drafted in conformity with that order.

white co-workers refer to petitioner as a troublemaker (Tr. 58-59, 74, 83, 112, 290, 339, 581-582); that petitioner had a poor attitude at work (Tr. 750-751); that he was a loner and did not participate in any employee activities by choice (Tr. 96, 521, 751); that petitioner had trouble getting along with people (Tr. 521, 551); that he argued with other employees and disrupted his work (Tr. 394); and that he became angry and unpleasant when contacted by supervisors (Tr. 364, 448-449). This evidence was contested by testimony that he had good working habits (Tr. 63-64); that he was diligent, alert and dependable (Tr. 113, 115); and that he was "a pretty excellent worker" (Tr. 290). The conflicting nature of the evidence is reflected in the district court's findings of fact, which concluded both that petitioner's "performance in his job was satisfactory" (Pet. App. 29a) and that petitioner "is known by all his co-workers, both supervisory and otherwise, as a troublemaker. He has earned this label because he has gone out of his way to create turmoil and controversy * * *" (*id.* at 27a). The district court, based on the evidence presented at trial, held that petitioner should be retroactively promoted to a GS-7 grade level effective June 28, 1970, and to GS-8 grade level effective June 28, 1972, with an appropriate award of backpay and attorneys' fees (*id.* at 39a-40a). Dissatisfied with this relief, petitioner sought to amend the judgment on the theory that he would have been advanced to higher grade levels following his court-awarded promotion in 1972 to the GS-8 position or, in the alternative, that he would have at least received step increases at the GS-8 level (*id.* at 41a-42a).[2] The district court denied petitioner's motion to amend the judgment (*id.* at 41a-43a), and petitioner appealed.

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[2]Petitioner also challenged the amount of the attorneys' fees award (Pet. App. 42a), but the attorneys' fees issue is not involved in this petition (see Pet. 11 n.2).

2. On appeal, the Tenth Circuit substantially affirmed the district court's judgment but, in effect, granted the alternative relief that had been sought in petitioner's motion to amend the judgment. Thus, the court of appeals held that petitioner was entitled to the automatic step increases that he would have received as a GS-7 from 1970 to 1972 and as a GS-8 from 1972 until he was actually upgraded pursuant to the judgment below (Pet. App. 14a-15a, 16a-17a, 22a).[3] With regard to petitioner's further contention that he should have been promoted above the GS-8 grade level, however, the court of appeals found there was a "good deal of evidence" that petitioner went "out of his way to create turmoil and controversy" (*id.* at 13a), and concluded that there was evidence in the record to support the trial court's finding that petitioner would not have advanced beyond the GS-8 position (*id.* at 15a). Because that factual finding was not clearly erroneous, the court of appeals saw no basis for setting aside the trial court's determination (*id.* at 16a).

ARGUMENT

Petitioner contends that notwithstanding his retroactive promotions and step increases he has been denied full relief. This case, however, poses no significant question of law under Title VII, presents no conflict with decisions of this Court or the courts of appeals, and does not warrant further consideration by this Court.

1. The decision of the court of appeals does not articulate any novel theory concerning the proper allocation of burdens of proof under Title VII of the Civil Rights Act of 1964 once unlawful discrimination has been established.

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[3]The court of appeals also reversed the district court's ruling on attorneys' fees and remanded the matter for further proceedings (Pet. App. 17a-23a). On remand, the district court increased the attorneys' fees award and added the automatic step increases to the amount of petitioner's backpay award. See Nos. Civ-73-591-E & Civ-78-0091-E (W.D. Okla. July 22, 1981), appeal pending, No. 81-1930 (10th Cir.).

Rather, the court below simply concluded that on the factual record before it petitioner would not have been promoted above the GS-8 grade level even in the absence of discrimination.

Title VII mandates that injured employees be restored to the positions they would have occupied but for unlawful discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418-419 (1975); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 252 (5th Cir. 1974), cert. denied, 439 U.S. 1115 (1979). Where a claimant asserts denial of a specified promotion and the court finds that the denial was discriminatory, the claimant is presumptively entitled to a retroactive promotion to that position, with the burden shifting to the employer to show that even absent the discrimination the plaintiff would not have been selected for the position. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-773 (1976); *Marotta* v. *Usery*, 629 F. 2d 615, 617-618 (9th Cir. 1980); *Richerson* v. *Jones*, 551 F. 2d 918, 924-925 (3d Cir. 1977); *Day* v. *Mathews*, 530 F. 2d 1083, 1085 (D.C. Cir. 1976); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F. 2d 437, 444 (5th Cir.), cert. denied, 419 U.S. 1033 (1974); *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F. 2d at 259-260.

In this case both the district and appellate courts concluded that petitioner had been discriminatorily denied a promotion to a GS-7 grade level position in 1970 and a GS-8 grade level position in 1972. Petitioner was properly awarded retroactive promotions with backpay to compensate for those specific instances of discrimination. Petitioner, however, contends that once discrimination has been established, he is entitled to hypothetical promotions beyond the ones serving as the foundation for his Title VII action (Pet. 26-27). Whatever the merits of this contention in the abstract, it is clear that on this record petitioner is not

entitled to additional relief based on speculative promotions along a hypothetical career ladder. The district court, in a finding sustained by the court of appeals, specifically concluded that petitioner would not have received any further promotion beyond the GS-8 grade level even absent discrimination.[4]

Petitioner attempts to convert this purely factual holding into a question of law by arguing that the courts below improperly imposed on him the burden of proof regarding subsequent promotions. Neither court below specifically addressed the burden of proof issue. It is clear, nonetheless, that, contrary to petitioner's assertions (Pet. 36-39), substantial evidence supports the district court's conclusion that petitioner would not have been promoted beyond the GS-8 grade level even absent discrimination. During a five-day hearing the district court heard evidence that petitioner had trouble getting along with people (Tr. 521, 551), argued with other employees and disrupted his work (Tr. 394), became angry and unpleasant when contacted by supervisors (Tr. 364, 448-449), had an overall poor attitude at work (Tr. 750-751), was commonly referred to as a troublemaker (Tr. 58-59, 74, 83, 112, 290, 339, 581-582), and was a loner who did not participate by choice in any employee activities (Tr. 96, 521, 751). These factors combine to support the district court's holding that petitioner would not have been promoted above the GS-8 grade level even in the absence of

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[4]The district court concluded (Pet. App. 42a):

> The court finds that plaintiff would not have received any promotions or step increases after June 28, 1972, because he was a trouble maker and spent a great deal of his time agitating other employees against management and became so preoccupied with his efforts to disrupt the procedure at Tinker that his job performance was unsatisfactory, and his denial of advancement after said date was because of these factors and not because of his race.

discrimination (Pet. App. 27a-31a, 42a).[5] The court of appeals concluded that this factual determination was not clearly erroneous (*id.* at 16a), and this factual issue presents no question warranting review by this Court.

2. Petitioner further contends that the court of appeals erred in its application of the "clearly erroneous" standard of review by deferring to the trial court's factual determination that petitioner would not have advanced beyond the GS-8 level. Although petitioner urges this Court to review this case in order to elaborate on Rule 52(a), Fed. R. Civ. P., no such elaboration is warranted on the present record.

This Court has repeatedly observed that the courts of appeals, in reviewing backpay determinations under Title VII, must recognize "that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 421-422. See also *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 780. Moreover, this Court has held that the standard of appellate review in such cases "will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." *Albemarle Paper Co.* v. *Moody, supra*, 422 U.S. at 424-425, quoting *Langnes* v. *Green*, 282 U.S. 531, 541 (1931). And it is well established that the reviewing court should not set aside the trial court's factual findings as clearly erroneous unless a careful review of the record leaves the court with a definite

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[5]Petitioner intimates (Pet. 17) that there is no record evidence of his conduct after 1972 to support the district court's conclusion that he would not have advanced beyond a GS-8 grade level. This contention overlooks the fact that one of petitioner's current supervisors testified that petitioner was presently regarded by his fellow employees as being "aloof" and having "lots of problems" (Tr. 521).

and firm conviction that a mistake has been made. See, *e.g.*, *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

Under these principles, the court of appeals properly declined to set aside the trial court's factual determination concerning petitioner's proper grade level.[6] The fact that the court of appeals set aside the district court's similar finding that petitioner would not have received step increases (see pages 3-4, *supra*) shows that the appellate court independently evaluated the evidence and did not unduly defer to the trial court's determinations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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[6]This case is not at all like *Swint* v. *Pullman-Standard*, 624 F. 2d 525 (5th Cir. 1980), cert. granted, Nos. 80-1190 & 80-1193 (Apr. 20, 1981), in which the court of appeals chose to set aside the trial court's factual findings.

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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Petitioner, Anthony M. Salone, Jr., wishes to respond to some of the points made in the government's Brief in Opposition to the Petition for Writ of Certiorari.

1. The Government side-steps the legal issue raised by this case by asserting that there are only questions of fact

involved. Petitioner reiterates that a reading of the decisions of both the District Court and the Court of Appeals makes it clear that the burden of proving entitlement to further promotions was placed on petitioner. For example, the Court of Appeals notes that the evidence was conflicting[1/] and, indeed, the findings of the District Court themselves were conflicting.[2/] Nevertheless, all doubts were resolved against petitioner. In the cases cited with approval by the Government on page 5 of its brief, on the other hand, it is clear that the burden was on the employer to demonstrate that a person discriminated against would not have

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1/ Pet. App. 12a-14a.

2/ Compare, Pet. App. at 29a, with Pet. App. at 42a.

advanced. Thus, this Court has held that doubts should be resolved against the party responsible for the illegal discrimination. Franks v. Bowman Transportation, Co., 424 U.S. 747, 773, n. 32 (1976).

Therefore, the legal standard applied by the Tenth Circuit is directly in conflict with the standards applied by other courts of appeals and announced by decisions of this Court. Since it is uncontested by the government that the question of entitlement to relief after a finding of discrimination is an important and recurring issue in Title VII cases, this clear conflict between the circuits should be resolved by the Court.

2. With regard to whether the findings of fact of the district were clearly erroneous, the Government is able to refer to only a single record cite

indicating that anyone testified to difficulties petitioner had in his work after 1972 (the date when he was unlawfully denied a promotion). Even that testimony is flatly contradicted by documentary evidence which establishes that petitioner consistently received ratings of 98 to 99 in a performance scale of 100, and was nominated for an outstanding performance rating in 1976. Moreover, as the government itself notes, the district court in its original findings of fact found that petitioner's performance in his job was satisfactory. Given these clear facts, the district court's later finding, in response to the motion to alter or amend the judgment, that petitioner performed unsatisfactorily is clearly an after-thought with no support whatsoever in the record. Indeed, the finding was essentially overruled by

the Court of Appeals when it held that petitioner was entitled to step increases, since such step increases are conditioned upon satisfactory performance in one's job.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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